No. 222

IN THE

Supreme Court of the United States

October Term, 1957

HUBERT MASON, Petitioner,

v.

UNITED STATES OF AMERICA

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, affirming his conviction for violation of 21 U.S.C. 174.

OPINION BELOW

The opinion of the Court of Appeals (App. A) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered June 25, 1958 (App. B). No petition for rehearing was filed. A petition for stay of mandate was granted. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

QUESTIONS PRESENTED

Whether the Court erred in refusing to allow the defendant to inquire into an alleged statement made, outside

the presence of the defendant, by a companion during interrogation of the companion by Federal Agents, which statement may have been of a nature to exculpate or exonerate the defendant.

STATEMENT

On August 16, 1957, the Grand Jury in and for the District of Colorado, returned an Indictment against Hubert Mason, hereinafter referred to as the Petitioner, and Howard Daniels, (co-defendant with Petitioner), charging a felony in one Count, said Indictment charged a violation of 21 U.S.C. 174.(R..2). The Indictment alleged that on or about the 10th day of June, 1957, in the City and County of Denver, in the State and District of Colorado, Hubert Mason and Howard Daniels did fraudulently and knowingly receive, conceal and facilitate the transportation and concealment of a quantity of a narcotic drug, to-wit, 167 grains of heroin, after said heroin had been imported and brought into the United States, knowing the same to have been brought in contrary to law, in violation of U.S.C. 174.

The Government's evidence disclosed that on June 10, 1957, two agents of the Bureau of Narcotics as well as two Denver City Detectives had the Petitioner's home under surveillance. The agents and detectives saw the Petitioner and a companion, Daniels, leave the Petitioner's home, enter the Petitioner's automobile and drive away. The City detectives and the narcotic agents, in separate cars, endeavored to stop the Mason car at the first intersection, however, the Mason car eluded them and proceeded at a rapid rate of speed with detectives and narcotic agents in their respective vehicles in pursuit. The Mason car was brought to a halt after one of the detectives fired three shots

into the Mason car's tires. The narcotic agents stated that during the course of the chase they observed the Petitioner extend his left hand through the open window of his vehicle and drop an object to the pavement. The object was subsequently retrieved and the contents thereof determined to be heroin in the amount of 70 capsules. The City detectives and the narcotic agents, with consent of the Petitioner, returned to the Mason home and proceeded to search the house and premises. During the course of the search a box containing several hundred gelatin capsules was found in a trash barrel at the rear of the house and another cellophane wrapper containing a number of white capsules of heroin were found under the doghouse. A cigarette wrapper containing three cigarettes and 1 gelatin capsule of heroin were found in the front yard. A cellophane wrapping similar to that used to wrap the capsules of heroin found on the street as well as the capsules of heroin found under the dog house was located in a frying pan in the Petitioner's home. Also a can of milk sugar (a substance commonly used to adulterate heroin) was found in the Petitioner's residence and the Petitioner admitted ownership and possession of the milk sugar.

During the course of the trial one of the Government agents testified relative to an interview with the Petitioner and his companion. On cross-examination the agent was asked whether the Petitioner was present together with the companion. When told that they weren't in the room together, the agent was asked whether the companion made any statement to the agent, to which the Government objected on the ground that it would be hearsay. The Court sustained the objection although Petitioner's counsel took the position that the "Hearsay Rule" was not applicable and if the door was open and the state-

ment was detrimental to the Petitioner the Petitioner would suffer the consequences. (R. 28).

A Jury, after trial, found the Petitioner guilty as charged. (R. 106-107).

Thereafter, the Petitioner, on December 2, 1957, was committed to the custody of the Attorney General for a period of five (5) years. (R. 4).

REASONS FOR GRANTING THE WRIT

The Supreme Court of the United States has not, since *Donnelly v. United States*, 228 U. S. 243, determined whether or not a voluntary confession or statement made by a third party which would tend to exculpate or exonerate the accused was admissible as an exception to the "Hearsay Rule".

1. The modern and humane movement tends to indicate that any rule which inclines itself to impede the accused in exonerating himself is an improper rule.

2. It is high time that the Supreme Judiciary of this country forcefully adopt the logical and reasonable interpretation of the admissibility of a statement of a fact against penal interest.

3. The admissibility of a statement of a fact against penal interests should certainly be available to the accused and denying its admissibility simply places a technical barrier against the presentation of all facts which the triers of fact are entitled to hear. (See *Wigmore on Evidence*, Vol. 5, 3d Ed., Sec. 1476, p. 281). (Petitioner further respectfully cites the Court to the case of *Hines v. Commonwealth of Virginia*, 117 S.E. 843).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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Counsel for Petitioner.

APPENDIX A

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT.

No. 5798 — May Term, 1958

Hubert Mason, Appellant,
vs.
United States of America, Appellee.

Appeal from the United States District Court for the District of Colorado.

[Filed June 25, 1958.]

Raymond D. Buckles for Appellant.
John S. Pfeiffer (Donald E. Kelley was with him on the brief) for Appellee.

Before Murrah, Pickett and Lewis, Circuit Judges.
Murrah, Circuit Judge.

On this appeal from a judgment on conviction for unlawful possession of narcotics (21 U.S.C. 174) the appellant first complains of the sufficiency of the evidence to support the jury verdict.

The evidence on behalf of the government was to the effect that while two narcotic agents and two Denver city

detectives had the appellant's home under daytime surveillance, the narcotic agents saw the appellant, Mason, and one Daniels leave Mason's home, enter Mason's automobile and drive away. The narcotic agents so informed the city detectives by radio, and followed the Mason car from a distance of about one block; the city detectives approached the Mason car from a different direction and drove in front of it at the intersection of 35th and High Streets in Denver. When they sounded their siren, the Mason car turned abruptly to the left into High Street, and proceeded at a rapid rate of speed, probably forty miles per hour, with the detectives and narcotic agents in pursuit. The Mason car was traveling on the left side of the street, the detectives on the right side and slightly behind. The narcotic agents were traveling about a half block to the rear and on the left, or the same side as the Mason car. Both the Mason car and the detectives' car ran the stop light at 34th and High, and as they approached 33rd Street, one of the detectives fired shots into the Mason car's tires, causing it to stop about a half block away. The narcotic agents testified that after the tires had been punctured, but before the car stopped, they saw appellant Mason extend his left hand through the door of his car and drop an object to the pavement. After the cars stopped, and while Mason and his companion were being arrested by the detectives, the narcotic agents walked back to 3248 High Street, where they picked up a cellophane package containing seventy capsules, later found to contain heroin. The officers and the two arrestees returned to the Mason home, and with the consent of Mason, the officers proceeded to search the house and premises. They found a box containing several hundred gelatin capsules in a trash barrel at the back of the house, and another cellophane wrapper containing a number of white capsules

under the dog house. They also found a cigarette package containing three cigarettes and one gelatin capsule containing heroin in the yard. They found a cellophane wrapper similar to that used to wrap the heroin capsules in a frying pan in the house.

The appellant takes the position that the testimony of the agents to having seen a small item one inch in thickness and two inches in length, thrown from a speeding automobile at a distance of a half block, is unacceptable as a matter of law, and ought to be disregarded; that disregarding this testimony, the government's case is entirely circumstantial and as consistent with innocence as with guilt, and therefore insufficient as a matter of law. But the testimony of the narcotic agents and one of the detectives was direct and positive to the point; it was competent evidence and entirely sufficient, together with other incriminating evidence, to sustain a guilty verdict. And see Harbold v. United States (10 CA) April 24, 1958, ... F. 2d .....

In the trial of the case, one of the government's agents testified concerning an interview with the appellant and his companion at the Intelligence Bureau of the Denver Police Station. On cross-examination, the agent was asked whether the appellant's companion was present during the interrogation. When told that they were not in the same room, the agent was asked whether the companion made any statement to the agent, to which the government objected on the grounds that it would be hearsay. The court sustained the objection as hearsay and inadmissible as such. Appellant's counsel took the position that the hearsay rule was for the benefit of the accused, and that "if we open the door and it was detrimental, we will suffer the consequences." No further record was made concern-

ing the nature of the companion's statement. On appeal, the appellant complains of the ruling of the court, saying that having waived the hearsay rule, he should have been permitted to inquire concerning whether appellant's companion made any statements to the agents which might have aided the appellant's cause.

No authorities are suggested to support the admissibility of the extrajudicial statement. Assuming, however, that the companion did make a voluntary confession or statement to the narcotic agent exculpating or exonerating the accused, modern and convincing authorities support its admissibility as a statement of a fact against penal interest. See Holmes dissenting in Donnelly v. United States, 228 U. S. 243; Hines v. Commonwealth of Virginia, 117 S.E. 843, 35 A.L.R. 431; Annot. 35 A.L.R. 441; Annot. 167 A.L.R. 394; Restatement A.L.I. Model Code on Evidence, Rule 509, p. 225; Vol. V Wigmore on Evidence, 3d Ed., § 1476, p. 281. But, there is no showing that the statement, if made, was voluntary and against the penal interest of the declarant. If the appellant had reason to believe that an exculpatory statement was voluntarily made against the penal interest of the declarant, it was incumbent upon him to request the court to conduct an appropriate inquiry in the absence of the jury to determine admissibility. See United States v. Carignan, 342 U.S. 36; Schaffer v. United States, 221 F. 2d 17. On its face the question called for a hearsay answer, and we do not think the court erred in refusing to permit the appellant to interrogate the agent in the presence of the jury concerning the statement, merely in the hope that he would turn up something favorable.

The judgment is affirmed.

APPENDIX B

Judgment

Twenty-Seventh Day, May Term, Wednesday, June 25th, 1958.

Before Honorable Alfred P. Murrah, Honorable John C. Pickett and Honorable David T. Lewis, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby affirmed.

It is further ordered by this court that Hubert Mason, appellant, surrender himself to the custody of the United States Marshal for the District of Colorado, in execution of the judgment and sentence imposed upon him, within ten days from and after the date of the filing of the mandate of this court in said district court.

(By order of July 8, 1958, the mandate of the United States Court of Appeals was stayed for a period of thirty days from that day under provision of paragraph 3 of rule 28.)

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In the Supreme Court of the United States

OCTOBER TERM, 1958

HUBERT MASON, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 6-9) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 25, 1958 (C.A. 9).[1] The petition for a writ of certiorari was filed on July 25, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

---

[1] The proceeding had in the Court of Appeals, referred to as "C.A.", is separately paginated.

QUESTION PRESENTED

Whether the trial court erred in stopping a line of questioning designed to determine whether or not a co-indictee, not on trial, had made an extra-judicial confession which might have exonerated petitioner, where defense counsel did not attempt to call the co-indictee as a witness or show his non-availability.

STATEMENT

An indictment filed August 16, 1957, in the United States District Court for the District of Colorado charged that petitioner and Howard Daniels had received and concealed 167 grains of heroin, in violation of 21 U.S.C. 174 (R. 2). Following a separate jury trial, petitioner was found guilty as charged (R. 106-107), and was sentenced to five years' imprisonment (R. 4). On appeal, the conviction was affirmed.

The facts relating to the single issue raised by petitioner may be summarized as follows:

After petitioner and Daniels had been apprehended (R. 10, 35), and the heroin recovered (R. 10-12, 36, 56-58, 60, 72-73),[2] they were taken to the Police Building in Denver, Colorado, and interrogated separately by federal narcotics agents Marsh and Gress. Petitioner denied that he had had any heroin, denied

---

[2] There were three packages or units of heroin involved. One package was dropped in the street by petitioner just before his apprehension (R. 10, 36, 56). One package was found under the dog house in petitioner's yard (R. 12). The third unit, a single capsule of heroin, was found in petitioner's front yard (R. 60). Admittedly, petitioner consented to the examination of his premises (Pet. 3).

that the heroin which the agents had recovered was his, and denied that he knew anything about the heroin (R. 27, 61).

After the foregoing information was elicited from agent Gress at petitioner's trial, the following exchange took place on cross-examination (R. 28):

> Q. Was Mr. Daniels present at that time?
>
> A. They weren't in the room together.
>
> Q. They were not in the room together?
>
> A. No, sir.
>
> Q. Did Mr. Daniels make any statement to you?
>
> MR. PFEIFFER: If it pleases the Court, that would be hearsay.
>
> THE COURT: If he wishes to interrogate, I do not think it would be admissible against this defendant. I do not see how it would be admissible.
>
> MR. BUCKLES: The only thing we have in mind, we do not know what statement was made or perhaps could have been made that is perhaps beneficial to the defendant.
>
> MR. PFEIFFER: Perhaps also it is detrimental.
>
> MR. BUCKLES: If we open the door and it is detrimental, we will suffer the consequences.
>
> THE COURT: I do not see how it would be admissible if it wasn't made in the defendant's presence.
>
> MR. BUCKLES: I understood that to be a protection for the defendant.
>
> THE COURT: It may be, but I think that is the rule. I think I will sustain the Government's objection to it.

ARGUMENT

Admittedly the trial court's ruling is correct under *Donnelly* v. *United States*, 228 U.S. 243. There, the defendant, who was on trial for murder, offered to prove that a third person, one Joe Dick, who died before trial, had confessed to the killing. There was evidence indicating that only one person had participated in the shooting. Defendant also offered to prove that Dick lived in the vicinity and presumably knew the habits of the victim; that the human tracks at the scene of the crime led toward Dick's camp; and that other signs indicated that whoever made the tracks suffered from consumption, a disease which Dick had. On this showing, this Court upheld the district court's ruling excluding Dick's confession as hearsay evidence. The *Donnelly* case has been uniformly and often followed by the lower courts. *Jeffries* v. *United States*, 215 F. 2d 225, 226 (C.A. 9); *Smith* v. *United States*, 106 F. 2d 726, 727 (C.A. 4); *Trefonc* v. *United States*, 67 F. 2d 954, 955 (C.A. 10); *Boyd* v. *United States*, 30 F. 2d 900, 901 (C.A. 9); *Neal* v. *United States*, 22 F. 2d 52, 55 (C.A. 4); see *Eastman* v. *United States*, 212 F. 2d 320, 322 (C.A. 9).

Although petitioner invites this Court to reconsider and reverse the rule of *Donnelly* v. *United States* along the lines of the dissent in that case, the facts of this case present no issue which would bring it within the rationale of the dissent. Petitioner neither proved nor offered to prove that Daniels ever made a statement to the narcotics agents exonerating petitioner. Defense counsel said he did not know

whether a statement had been made and whether, if there was one, it exonerated petitioner. Daniels was not shown to be deceased or otherwise unavailable as a witness. Even if Daniels had made a statement exonerating petitioner just after their joint arrest, such a statement taking the blame would not have the inherent credibility of the statement in *Donnelly*. Nor, in contrast to *Donnelly*, was such a statement corroborated by other evidence. To the contrary, here some of the heroin was thrown out of petitioner's automobile by petitioner (R. 9-10), and the rest was found in petitioner's yard (R. 12, 60). Even if the heroin belonged to Daniels, petitioner might well have been guilty of possessing the heroin. For these reasons, even if this Court had held in *Donnelly* that a voluntary confession by a stranger to the trial was admissible if the confession exonerated the defendant and the third party was not available as a witness, petitioner could not come within the terms of such a holding.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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